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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WILLIAM GRIFFIS, Defendant and Appellant.	C070266 (Super. Ct. Nos. 11F1836, 11F5776)

Defendant Kenneth William Griffis pled guilty to possession of methamphetamine and receiving stolen property. The trial court sentenced him to two years eight months in prison because he had prior felony convictions in the State of Washington. Defendant contends under the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, ch. 15) he was entitled to a county jail sentence: (1) because his prior convictions were neither pled nor proven to a jury; and (2) the record contains insufficient evidence that any of his prior convictions qualified as a strike.

We conclude the prior Washington convictions constituted sentencing factors that did not need to be pled and proven to a jury to render him ineligible for county jail. The People, however, concede the record contains insufficient evidence to support the court's finding that defendant's prior Washington convictions constituted strikes under California law. Because it is correct, we accept that concession. Accordingly, we affirm defendant's conviction but remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 2011, defendant was arrested for public intoxication when two Shasta County Deputy Marshalls saw him ride a bicycle into heavy traffic and narrowly avoid getting hit by three cars. During a search incident to arrest, officers discovered methamphetamine on him.

Defendant was charged with possessing methamphetamine, transporting methamphetamine, and public intoxication (the drug case). The complaint further alleged that defendant had been convicted of possessing a controlled substance in 2006 in Shasta County and that defendant had served a prior prison term within the meaning of Penal Code[1] section 667.5, subdivision (b). He pled guilty to possession of methamphetamine, all other charges were dismissed, and he was granted three years of Proposition 36 probation on April 20, 2011.

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[1] Undesignated statutory references are to the Penal Code.

On June 10, 2011, and July 29, 2011, defendant admitted he violated his probation by using methamphetamine. Probation was reinstated on each occasion. On August 26, 2011, defendant admitted using methamphetamine and violating his probation for the third time. His potential exposure at the time was three years in custody.

On September 28, 2011, defendant was charged in a second case with receiving stolen property with an enhancement for a prior prison term (the property case). On December 13, 2011, defendant pled no contest. He entered the plea with the understanding that he would be sentenced to no more than two years and eight months on both the drug and property cases. The following exchange occurred at the plea hearing:

"THE COURT: In [the property case] you're going to change your plea on Count 1 to a no contest plea, the enhancement would be stricken, and what you'd be looking at on this case, along with [the drug case], is a two-year, eight-month lid. Which means that you could get two years, eight months in state prison. He doesn't have any qualifiers. You could get two years, eight months in county jail, or you could get lesser, including probation. Is that your understanding of the agreement?

"THE DEFENDANT: Yes."

At the sentencing hearing on January 12, 2011, the trial court denied probation and imposed a two-year, eight-month sentence for both the drug and the property cases. The trial

court relied on the probation officer's report in denying probation. The reporter's transcript recorded the following:

"THE COURT: The Probation Officer in the report does discuss the presumptive ineligibility for probation on pages 9 and just at the top of page 10, lines 12 on page 9 to line 2 on page 10. I concur with the analysis made by the Probation Officer. And that's based on the defendant having five felonies in his resume. I observe, as pointed out, that some of those are dated, starts 1995 with a Washington felony, and then moves to 2000 with four Washington felonies; a total three year state prison sentence from a Shasta Felony in May of 2006. . . ."

"[¶] . . . [¶]

"[THE PEOPLE]: My only concern is that these charges are normally non-prison, and he's getting to prison because he has a prior strike that he hasn't admitted. So I think we should put something on the record so when he gets to CDC they don't try to kick him back.

"THE COURT: I think you may have done that, but do you want to state the dates of this strike.

"[THE PEOPLE]: Yes. My understanding is that his Washington State burglaries, that will be case 941003598, and 971005838 qualify as a strike. They're similar enough to the California statute that they would be considered a strike, and therefore that's how he's eligible for CDC rather than 1178 prison.

"THE COURT: I think it's good to put it on there. I know your office didn't charge it or even note the existence of it."

This timely appeal followed.

DISCUSSION

I

The Realignment Act

With certain exceptions, defendants sentenced under the Realignment Act are committed to county jail rather than state prison. (§ 1170, subd. (h)(1)-(3).) But prison sentences are imposed for those who have current or prior serious or violent felony convictions, who are required to register as sex offenders, or who have sustained a section 186.11 aggravated white collar crime enhancement. (§ 1170, subd. (h)(3).) Section 1170, subdivision (h) makes a strike a disqualifying factor for sentencing to county jail under section 1170.

II

Defendant's Washington Felonies Are Sentencing Factors That Did Not Have To Be Pled Or Proven To A Jury

Defendant contends he was entitled to be sentenced to county jail under section 1170, subdivision (h) because: (1) a prior conviction that results in an increased penalty must be pled and proven to a jury under *People v. Lo Cicero* (1969) 71 Cal.2d 1186; and (2) there is an implied pleading requirement in section 1170 for any factor that disqualifies a defendant from local custody. We disagree with defendant on both points.

In *Lo Cicero*, our Supreme Court (quoting from *People v. Ford* (1964) 60 Cal.2d 772, 794 held that "'[b]efore a defendant

can properly be sentenced to suffer the increased penalties flowing from . . . [a] finding . . . [of a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived.'" (*People v. Lo Cicero*, *supra,* 71 Cal.2d at pp. 1192-1193.) Defendant contends that principle applies here because a prison sentence qualifies as an increased penalty compared to a county jail sentence of equal length. He asserts this is so because serving a prison sentence would remove him from his support system of friends and family, require him to serve his entire term in prison without eligibility for the split-sentence option, and necessitate that he serve a period of parole after completing his prison term.

Lo Cicero and *Ford* are distinguishable from this case. The pleading and proof requirements established in those cases apply to statutes that affect whether a defendant is sentenced to probation instead of a period of incarceration (*People v. Lo Cicero*, *supra,* 71 Cal.2d at pp. 1193) or an enhanced duration of the defendant's sentence (*People v. Ford*, *supra,* 60 Cal.2d at pp. 794). Here, section 1170, subdivision (h)(3) prescribes only whether a defendant will serve his sentence in local custody (jail) or prison. A prison sentence rather than a county jail sentence does not constitute increased punishment for purposes of *Lo Cicero* and *Ford*.

Defendant argues that the Legislature intended an implied pleading requirement with respect to "facts disqualifying a defendant from service of his sentence in local custody" because of the addition of section 1170, subdivision (f).[2] Defendant's argument is baseless. There is no basis in the statute for implying such a requirement.

III

Insufficient Evidence Of A Prior Strike

Defendant contends and the People concede that the record contains insufficient evidence to prove that any of the Washington convictions constituted a strike within the meaning of the three strikes law. We agree.

"Under the Three Strikes law, a prior conviction from another jurisdiction constitutes a strike if it is 'for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.' (Pen. Code §§ 667, subd. (d)(2), 1170.12, subd. (b)(2.) Thus, the prior foreign conviction 'must involve conduct that would qualify as a serious [or violent] felony in California.' (*People v. Avery* (2002) 27 Cal.4th 49, 53 . . . .) 'To make this determination, the

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[2] "Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385." (Pen. Code, § 1170, subd. f.)

court may consider the entire record of the prior conviction as well as the elements of the crime.' (*Ibid.*) If the record insufficiently reveals the facts of the prior offense, the court must presume the prior conviction was for the least offense punishable under the foreign law." (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 810.)

Here, the probation report contains no more than a passing reference to the defendant having felonies in Washington. There is no indication that the court considered the entire record of the prior Washington convictions. The one and only mention of defendant's Washington convictions occurred at the end of defendant's sentencing hearing. The People's sole effort to align the elements of the Washington felonies to those of their California counterparts was the following statement by the prosecutor: "[The Washington felonies are] similar enough to the California statute that they would be considered a strike . . . ."

This is plainly not enough. There was insufficient evidence on the record that the elements of the Washington felonies qualify as serious or violent felonies in California. Accordingly, the case must be remanded for resentencing. The People will have the opportunity to introduce new evidence that the priors qualified as a strike, if they can. Both the United States and California Supreme Courts have held there is no double jeopardy bar to sentencing proceedings. (*Monge v. California* (1998) 524 U.S. 721 [141 L.Ed.2d 615]; *People v. Monge* (1997) 16 Cal.4th 826.)

DISPOSITION

The matter is remanded for resentencing. In all other respects, the judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

MAURO, J.